

PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE

Minutes of Meeting
October 16, 2007
Ellensburg, Washington

Members Present: Chair Tom Carr, Representative Lynn Kessler, Tim Ford, John Hughes, Ken Bunting, Frank Garred, Roselyn Marcus, Ramsey Ramerman, Candy Jackson, and Patience Rogge

Members Absent: Senator Adam Kline, Senator Pam Roach, and Representative Jay Rodne

Staff present: Jean Wilkinson (exemptions background) and Cynthia Jordan (minute taking)

Opening:

Chair Carr called to order the meeting of the Public Records Exemptions Accountability Committee at 10:05 a.m. on October 16, 2007, at Central Washington University, Student Union Building, Room 137 A & B, 1007 N. Chestnut Street, Ellensburg, Washington.

Chair Carr invited committee members and staff to introduce themselves.

Approval of Agenda

Motion: *To adopt the agenda for the **October 16, 2007**, Sunshine Committee Meeting. Made by Ken Bunting, seconded by John Hughes. The motion passed unanimously.*

Approval of Final Minutes for September 18, 2007 Sunshine Committee Meeting

Motion: *Ken Bunting made a motion to amend the minutes by replacing the phrase "government efficiency" which originally replaced "save taxpayer money" with "vital government interest/function" in September's final minutes and the Criteria for Reviewing Selected Exemptions, # 13. Roselyn Marcus moved to approve the minutes as amended, seconded by John Hughes. The motion passed unanimously.*

Ginseng Growers/Dealers Exemption – RCW 42.56.380(6)

Jean Wilkinson, AAG, Attorney General's Office, gave a staff presentation on this exemption.

- The exemption originally only applied to dealers (1996); two years later (1998) the statute was amended to include ginseng growers.
- Ginseng is a root crop with the primary market in Asia, and a small market in the United States.
- The Senate Bill Report (2/15/1996) indicates the exemption due to an international treaty, which is the Convention on International Trade In Endangered Species of Wild Fauna and Flora. Under the treaty, each state is required to collect information about the trading of ginseng.

- Wild ginseng is protected by the treaty. Cultivated ginseng is harvested and traded. There is a concern that if wild ginseng is harvested unmonitored it could become extinct.
- The reason for the exemption is that if farmers and growers provide production and sales information to the Dept. of Agriculture, and it can be obtained through a public records request, it would give competitors an advantage and possibly harm business.

Committee discussion: The treaty does not require that the State of Washington provide an exemption from disclosure, only that if there is going to be trading in ginseng, that the State issue a certificate. It is the wild ginseng that is endangered, so trading in wild ginseng is not permissible. Cultivated ginseng is allowed to be traded. The committee asked if other agricultural exemptions are as sweeping and broad?

Mr. Ramerman made a suggestion that the committee look at not just the agricultural exemptions, but all the exemptions that apply to regulated industries in a global sense, rather than pick apart one exemption at a time.

Public Comment

Toby Nixon, Vice President of the Washington Coalition for Open Government-WACOG - How do we achieve regulating the regulators without making this information available to competitors? The only way to reduce the numbers of these types of exemptions is to consolidate them, or reduce the amount of regulations.

Keith Matthews, Shipper Community for Fresh Apples and Pears – Lower Yakima County- Information in a global sense – for example, how many boxes of red delicious apples went to China last year - is fine, but disclosure of the details of individual businesses - financial records and customer lists – is not good. Growers support Department of Agriculture inspections required by trade export regulations, and to establish quality standards to maintain good consumer acceptance within the United States.

Dan Wood, Washington Farm Bureau –We need to protect the information that government ought not to disclose on business operations, to make sure that Washington can remain a competitive and good place to do business. Farmers and other businesses provide tax records to the Department of Agriculture to qualify for certain tax incentives.

The chair asked if this committee recommended repealing subsection 6, do you think that ginseng would still be protected under subsection 5? Answer: The idea of reviewing in totality the exemptions is a worthwhile pursuit so that we can make sure that what ought to remain private, remains private, and what ought to be disclosed on government activities is discloseable.

Mary Toohey – Asst. Director for the Department of Agriculture – There are a very limited number of ginseng growers in the state at this time, i.e. two registrants. US Fish & Wildlife insists that we meet the same standard of the east coast because the federal agency needs to track all shipments of ginseng because illegal shipments are a concern.

Q. What type of inventory information do you collect? Answer: We do not collect pricing information on ginseng. We collect inventory at the dealer and the grower level. We furnish this information to US Fish & Wildlife.

Motion: *Mr. Ramerman moved that at the Sunshine Committee's next meeting, Tuesday, November 6, 2007, that the committee review the agriculture exemptions for business and financial information in RCW 42.56.380, and if there are other agriculture exemptions outside of 42.56.380 we include those with the goal of coming up with a uniform exemption for business and financial information on agricultural products that we can use for simplifying this process. Committee members will come prepared with language. Ms. Rogge seconded the motion. The motion passed unanimously.*

Infant Mortality Review Exemption – RCW 42.56.360(1)(f)

Jean Wilkinson gave a presentation:

- This exemption is a result of a 1992 bill.
- In the late 1980's the federal public health officials recommended child mortality reviews as useful tools to review the effectiveness of public health programs and better focus public health programs.
- In 1992 the legislature granted authority to local health departments to conduct mortality reviews into the deaths of infants and children.
- In mortality reviews local health officers identify deaths, then collect information about the death which can include a review of medical records, and interviews of parents, caregivers, and medical providers about the factors that contributed to the death.
- The Senate Bill Report states that in order obtain cooperation during the interview process it is necessary to protect information from disclosure. Data may be disclosed at an aggregate level.
- In 1996, the Seattle-King County Health Department issued a report that made recommendations based on a mortality review of deaths in 1992-94. One example from that report is that, after analyzing factors that contributed to deaths caused by premature births, the report made several recommendations to develop and improve health programs to reduce the risk of premature births.
- In summary, the legislative history indicates that the exemption is there to obtain cooperation in the collection of information so that government can then use this information to develop statistical patterns that would then support more effective public health programs.

Committee Discussion: Federal and state law protect medical records from disclosure. However, interviews with parents would not be covered by other exemptions. Could limits on the disclosure of this type of data put the public at risk? Answer: complaints could be filed with licensing or disciplinary boards for medical facilities and practitioners.

Public Comment:

Dick Goldsmith, Director of Legal Services and Public Policy for the Association of Washington Public Hospital Districts – Urged that the exemption be continued.

Motion: *Mr. Ramerman made a motion that this exemption be maintained, because this is a classic case where the information that is being collected is for the good of the public. The information, but for the exemption, would not exist. Motion seconded by Rep. Kessler. There was further discussion on the motion and a vote was taken in which five members voted in favor of the motion, and five members against. Motion failed.*

A second motion was made by Chair Tom Carr that the committee investigate this exemption further with an eye towards proposing narrowing language to the legislature. Mr. Hughes seconded the motion. The motion passed unanimously.

Legislative records - RCW 42.56.010(2)

Chair Tom Carr received a letter from the leaders of the House and Senate asking that this exemption not be considered until all of the legislative committee members could be present. Rep. Kessler also added that the request included waiting until the current case gets through the Supreme Court. A ruling is expected next year and the committee could revisit this after the ruling.

Jean Wilkinson gave a presentation:

- The bill reports and legislative history are not helpful in shedding light on the specific definition for “public records” that applies to the legislature. The last sentence of the definition of “public record” is a specific definition that applies to the Secretary of the Senate, and the Office of the Chief Clerk of the House. That sentence was added to the statute in 1995.
- Prior to that time the legislature had interpreted the Public Records Act as not applying to the legislature because it did not believe that it came within the definition of a “state or local agency.”
- In the early 1990’s that interpretation was litigated in Thurston County Superior Court and the legislature did not prevail in its interpretation.
- The definition of public record was then amended, and additional language was added to specify which records of the legislature are public records.
- Under the 1995 definition, only certain types of legislative records are public records. What are not public records are: communications between legislators; between legislators and their staff; and between legislators and their constituents.
- The issues being litigated currently have to do with communications between legislators, and between legislators and their staff. The case relates to the calculation of expenditure limits imposed under Initiative 601. The superior court judge made a ruling that emails and memoranda are protected under the legislative privilege (State Constitution, article 2, section 17).
- Similar provisions in the constitutions of other states, and the federal constitution, have been interpreted to protect communications between legislators, and between legislators and their staffs. That is the interpretation currently under consideration by the Washington State Supreme Court.
- The pending court cases may affect this committee’s work because if there is a constitutional provision that makes certain legislative communications confidential, then that raises questions about whether a statute could amend a state constitutional provision.

Committee Discussion: If the court finds that the legislative privilege exists, would there still be a purpose for having the legislature subject to public disclosure requirements. There is validity in waiting until the Supreme Court makes a ruling before the committee makes a recommendation.

Public Comment:

Roland Thompson, Allied Daily Newspapers of Washington – If the committee considers this exemption in the future, it should do so fairly carefully.

Toby Nixon, President of the Washington Coalition for Open Government-WACOG – To the maximum extent possible communications among and between legislators should be public, with a limited exemption from disclosure for private information of constituents.

Further Committee Discussion: If the Supreme Court does not rule on this before the next session, the committee would like Speaker Chopp to come and talk about this.

Motion: Ms. Marcus made a motion that the Committee postpone the examination of the definition of legislative records until after the Supreme Court's decision of the 601 Farm Bureau case. Ms. Rogge seconded the motion. There was further discussion on the motion, and a vote was taken and passed unanimously.

Applications for Public Employment Exemption – RCW 42.56.250(2)

Jean Wilkinson gave a presentation of the background of this amendment:

- Prior to 1987, court rulings interpreting the Public Records Act had led to a belief that there was a general privacy exemption. The Supreme Court ruled in the late 1980's that was not true. That led to some rethinking of a need for more specific exemptions.
- In 1987, this bill added some protections for employment related information. This was triggered by a court decision concluding employee names and home contact information must be disclosed. The 1987 bill also contained this exemption for applications for public employment, including resumes and all materials submitted with respect to applications for public employment. The Governor's veto message states that for certain executive positions, releasing the names and applications of the top candidates could jeopardize candidates' current work relationships and reduce the applicant pool for state positions.

Committee Discussion: Is there a definition in the bill of public employee? No, there is not.

Public Comment:

Toby Nixon, President of the Washington Coalition for Open Government-WACOG –The coalition feels that it is important that the public be able to verify the claims that have been made by public employees about their background, employment history and education, especially once they have been hired.

Lucinda Young, Washington Education Association –The original reason for the exemption still exists: applicant quality and quantity, and safety concerns as applications contain very personal information. Repeal could have a chilling effect on the applicant pool.

Victoria Lincoln, Association of Washington Cities – Supports keeping this exemption.

Dick Goldsmith, Director of Legal Services and Public Policy for the Association of Washington Public Hospital Districts – Has concerns about the chilling effect on the applicant pool, privacy

concerns, and making sure that the best and brightest are hired. If we are looking only at the higher level positions where it is a public hiring process, then information where it does not invade personal privacy should be released, but not all positions should be opened up.

Mike Belenski - Once you become a public employee your information should be open for public disclosure.

Karen Schweigert, attorney representing commissioned Washington State Patrol employees – Based on safety concerns for law enforcement officers, fire fighters and social workers, supports the exemption, or at least making it more narrowly tailored to protect peace officers.

Kim Triplett, Washington State Patrol Trooper – Supports the exemption.

Rick Holly, Retired Washington State Patrol Sergeant – Supports the exemption.

Tommy Pillow – President of the Washington State Trooper’s Association – Please take into consideration that there is a safety issue if this exemption were to be removed and information released through public disclosure.

***Motion:** Chair Tom Carr made a motion that the remainder of the agenda be tabled until the next meeting on Tuesday, November 6th in Olympia. The motion passed unanimously.*

Meeting adjourned at 2:00 PM

APPROVED: November 6, 2007